No. 86-747

In The Supreme Court Of The United States

OCTOBER TERM, 1986

STEPHEN B. HEINTZ, Commissioner of the Connecticut Department of Income Maintenance,
Petitioner,

v.

DALE HILLBURN, by his parents and next friends Ralph and Eleanor Hillburn, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATES OF INDIANA AND PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF THE GRANT OF CERTIORARI

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INTEREST OF THE AMICI

Amici are the states of Indiana and Pennsylvania acting by and through their Attorneys General. *Amici,* by and through state public welfare agencies, voluntarily participate in the Medicaid program and thereby make available publicly financed health care to their citizens who would not otherwise be able to afford the cost of medical care, notably including nursing facility care. As participants in the Medicaid program, *amici* are required to adhere to the conditions of participation in the program, including the condition of participation that requires the state Medicaid "single state agency" to afford program recipients the right to receive covered services from the qualified provider of their choice. 42 U.S.C. § 1396a(a)(23).

In addition, the *amici,* by and through separate and distinct state health inspection agencies, are responsible for establishing and maintaining health standards for facilities that participate in the program and for determining whether or not facilities are qualified to participate in the program. 42 U.S.C. § 1396a(a)(33)(B). *Amici* urge that certiorari be granted in order for this court to clarify important questions concerning the quality of care enforcement responsibilities of the states under the Medicaid program.

REASONS FOR GRANTING THE WRIT

The *amici* states of Indiana and Pennsylvania urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Second Circuit in order to provide plenary review of the decision below which raises issues of considerable importance to the states.

The quality of care provided by nursing facilities that participate in the Medicaid program and receive public financing for the cost of services provided to program beneficiaries is a matter of substantial public concern. Congress addressed the quality of care concerns through a program of "cooperative federalism" wherein state health inspection agencies and the Secretary of the United States Department of Health and Human Services have shared responsibilities for determining whether or not facilities are qualified to participate in the program. Specifically, the Act requires state health inspection agencies to establish and maintain standards of care, 42 U.S.C. § 1396a(a)(9), and to determine through the "survey and certification" process whether or not facilities are qualified to participate in the program. 42 U.S.C. § 1396a(a)(33)(B). The determinination of whether a facility is qualified requires a determination by the state health inspection agency of whether the facility as a whole substantially complies with the conditions of participation and whether the facility's plan to correct any deficiencies is acceptable. 42 C.F.R. 442.105(a) and (b). An opportunity to contest the certification determination of the state survey agency must be provided through state administrative proceedings. 42 C.F.R. § 431.151.

Whenever any facility also participates in the Title XVIII Medicare program, however, the Secretary of Health and Human Services is responsible for determining whether or not the facility is qualified to participate in the Medicaid program —which determination is binding upon the states. 42 U.S.C. § 1396i. Even if the facility does not participate in Medicare, however, the Secretary is authorized to "look behind" the determination of the state health inspection agency as to

whether or not a facility is qualified to participate in the program. 42 U.S.C. § 1396a(a)(33)(B).

Once a facility has been determined to be qualified to participate in the program, recipients of medical assistance are entitled to receive payment for the cost of services provided. 42 U.S.C. § 1396a(a)(23).

In addition to the survey and certification responsibilities of the state health inspection agency, the Act requires that inspections be conducted of the adequacy of health care provided to each Title XIX-assisted individual by participating skilled nursing facilities. 42 U.S.C. § 1396a(a)(31). Except for the requirement that inspections be conducted, and reports of findings be forwarded to the state health inspection agency, there is no indication in the Act of the regulatory authority, or responsibility, of the single state agency to take action based upon findings of deficiencies with respect to individual patients. The Court below, however, upheld a requirement that the Connecticut Department of Income Maintenance terminate the provider agreement of certified facilities, based upon individual deficiencies, which order requires the Connecticut single state agency to contravene the statutory rights of every Title XIX-assisted patient in the facility to receive assistance for the cost of services provided by the qualified (certified) provider of their choice.

The holding of the court below raises issues of considerable importance to the states that warrant review by this Court, notably including the appropriateness of an order that requires a state to violate the statutory rights of its citizens to receive covered services from qualified providers. The appropriateness of any order that has the effect of requiring the forced relocation of elderly and infirm citizens from a *qualified* facility because of individual deficiencies in the care provided to *other* patients raises issues of obvious concern and importance.

In addition, however, *amici* are most concerned about the confusion in the roles of the state health inspection agency

and the single state agency evidenced by the Court below. It is basic that state agencies may only act within the scope of their authority and responsibility. Furthermore, it is a fundamental principle of § 1983 litigation that relief against a public official may only be based upon personal responsibility and accountability. *Rizzo v. Goode,* 423 U.S. 362 (1976). The decision of the court below, however, misconceives the scope of responsibilities of the single state agency for quality of care enforcement and requires the head of the Connecticut single state agency to take action that is beyond the scope of his statutory responsibility. As *amici* demonstrated, *supra,* the clear focus of quality of care enforcement is on the state health inspection agency and not on the single state agency for purposes of administration. Certiorari should issue to clarify the respective responsibilities of the single state agency and the state health inspection agency for purpose of quality of care enforcement.

Furthermore, the Act contemplates that quality of care will be enforced through state administrative mechanisms undertaken by the state health inspection agency. The Court below allows private litigants and the federal courts to supplant the administrative mechanisms provided for in the Act. In this action, private § 1983 litigation resulted in the entry of remedial relief against the single state agency, notwithstanding the absence from this litigation of the entities who are most directly responsible for ensuring quality care — the nursing facilities themselves and the state health inspection agency. Certiorari should therefore issue to clarify that the administrative mechanisms provided for in the Act may not be bypassed by § 1983 litigation.

Finally, the importance of the case transcends the need of the states for clarification of the quality of care enforcement responsibilities under the Medicaid Act. This Court has repeatedly held that public officials may only be required to adhere to clearly stated, mandatory conditions of participation in programs enacted pursuant to Congress' spending authority. *Pennhurst State School v. Halderman,* 451 U.S.1

(1981); *Middlesex County Sewerage Authority v. National Sea Clammers,* 453 U.S.1 (1981). The Court below, however, upheld the judgment of the District Court based only upon its conclusion that the relief ordered by the District Court, including the requirement of termination of provider agreements, was "not precluded" by the Act. Certiorari should issue in order for this Court to review whether a court may appropriately enjoin public officials to take action which is not authorized, or required, by the Act based solely upon notions of the appropriate exercise of judicial discretion. The Court below in effect created a remedy for individual deficiencies (termination of provider agreements) and enjoined the Connecticut single state agency to take such action when other remedial steps (beyond the control of the single state agency) fail to remedy the situation in the absence of any legislative direction authorizing such relief. Furthermore, the remedy created by the Courts below squarely conflicts with explicit statutory provisions linking a facility's participation to its certification. 42 U.S.C. § 1396a(a)(33)(B); 42 U.S.C. § 1396i.

Legislative clarification of the enforcement role of patient review team findings concerning individual patients may be indicated. However, the *amici* states are confident that Congress would provide a remedy that is tailored to the individual violation. The Court below, however, improperly usurped legislative functions by creating a remedy for individual deficiencies. Furthermore, the remedy created by the Courts below is clearly inconsistent with the survey and certification methodology provided for in the Act to make the determination of whether or not a facility is qualified to participate in the program.

CONCLUSION

For the foregoing reasons, the *amici* states urge that this court grant the petition for a writ of certiorari.

Respectfully Submitted

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